No. 82-1327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners,

v.

THE STATE OF CALIFORNIA, *et al.*,
Respondents.

REPLY BRIEF OF PETITIONERS WESTERN OIL & GAS ASSOCIATION, *ET AL.*

HOWARD J. PRIVETT
DONNA R. BLACK
McCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017
(213) 624-2400

E. EDWARD BRUCE*
BOBBY R. BURCHFIELD
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, DC 20044
(202) 662-6000

Attorneys for Petitioners
*Counsel of Record

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I. RESPONDENTS HAVE NOT REBUTTED ANY OF THE ESSENTIAL ELEMENTS OF WOGA'S ARGUMENT.[1]

Our opening brief set forth four basic propositions in support of our argument that the selection of OCS tracts for leasing is not a federal activity "directly affecting" the coastal zone within the meaning of Section 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. 1456(c)(1) (CZMA): (1) The "1953 Compromise" embodied in the

[1] The brief which Western Oil & Gas Association, *et al.*, filed as petitioners in No. 82-1327 will hereafter be cited as "WOGA Br." Our brief as cross-respondent in No. 82-1511 will be cited as "WOGA Resp. Br." The briefs of respondents in Nos. 82-1326 & 82-1327, State of California, Natural Resources Defense Council, *et al.*, and County of Humboldt, *et al.*, will be cited as "Cal. Br.," "NRDC Br.," and "Local Gov. Br.," respectively. The briefs of *amici curiae* Coastal States Organization, *et al.*, Alaska, and New Jersey will be cited as "CSO Br.," "Alaska Br.," and "N.J. Br.," respectively.

Outer Continental Shelf Lands Act, 43 U.S.C. 1331, *et seq.* (OCSLA), and the Submerged Lands Act, 43 U.S.C. 1301, *et seq.*, prescribed clear-cut lines of federal and state authority over the leasing of OCS lands; (2) an intention to depart from these clearly delineated lines should not be assumed, absent a clear statement in subsequent legislation; (3) Section 307(c)(1) of the CZMA contains no such clear statement either on its face or in its legislative history; and (4) the amendments in 1976 to the CZMA and in 1978 to the OCSLA evidence no congressional intention to depart from the 1953 resolution of state-federal control over OCS leasing decisions.

Neither respondents nor the *amici curiae* supporting them have advanced anything to counter any of the fundamental underpinnings of WOGA's argument.

A. Congress in 1953 Settled the Controversy Between the State and Federal Governments Over Ownership of the OCS.

Respondents argue that Congress retained the power, following its adoption of the 1953 Compromise, to provide the States with additional authority over OCS leasing. (NRDC Br. 6). This, of course, contributes nothing to the point at issue—did Congress subsequently exercise that power when it adopted or amended the CZMA?

They also rebut an argument, which WOGA did not make—"that the OCSLA is the sole vehicle" through which authority over the OCS can be exercised (*id.* at 4)—by pointing to the application of general federal environmental statutes to the OCS. (*Id.* at 8-9 n.7; *see also* Cal. Br. 33 n.53; Local Gov. Br. 43). But obviously, Congress' inclusion of OCS-related activities within the ambit of general federal environmental statutes has nothing to

do with the 1953 resolution of the state-federal proprietary control issue.[2]

B. The "Clear Statement" Doctrine Is Applicable Here.

Respondents note that the clear statement doctrine has sometimes been used out of "solicitude for legitimate state concerns" and thus find "irony" in WOGA's reliance upon it here. (NRDC Br. 7 n.5). Notably, they do not (and could not) explain this Court's application of the doctrine in *Rucklehaus* v. *Sierra Club*, ____ U.S. ____, 51 U.S.L.W. 5132 (July 1, 1983), on these grounds. Similarly, they offer no principled argument why solicitude for legitimate federal concerns, such as ownership and control over the OCS, should not be protected by the doctrine.

C. Neither Section 307(c)(1) Nor Its Legislative History Constitutes a Clear Statement of Congress' Intention To Provide the States with Authority To Apply CZMA Programs To Bar Leasing of Federal OCS Lands.

Far from arguing that Section 307(c)(1) contains a clear statement of congressional intention to extend consistency review to the selection of OCS tracts for leasing, respondents state that the meaning of the term "directly affecting" is unclear. (Cal. Br. 21; NRDC Br. 19-20; CSO Br. 6). Moreover, instead of adopting a "plain meaning" approach to Section 307(c)(1), respondents concede that a

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[2] The Local Governments refer to the Clean Air Act, 42 U.S.C. § 7401, as supposedly typifying the approach embodied there and in the CZMA of permitting States to have a significant role in addressing environmental or resource issues. (Local Gov. Br. 16). They fail to mention, however, that the the Clean Air Act does not apply to the federal OCS, in the light of the Secretary of the Interior's "comprehensive" responsibilities under the OCSLA. *California* v. *Kleppe*, 604 F.2d 1187, 1192 (9th Cir. 1979).

"liberal," "expansive," or "broad" definition of the term is needed to support their position. (Cal. Br. 9 & n.12, 47). Further reflecting their concession that the statute on its face does not support them, respondents offer a variety of formulations for the "directly affecting" test of that section, none of which ascribes any meaning to the term "directly." (*See, e.g.*, Local Gov. Br. 26-27; NRDC Br. 2-3, 21-22; N.J. Br. 11-12).

Respondents attempt to obscure the lack of support for their position in the language of Section 307(c)(1) by citing other portions of the CZMA or its legislative history which refer in general terms to OCS activities. (Cal. Br. 19 n.31, 29-30 n.48; NRDC Br. 13 n.12, 36-37). However, as *amici* CSO admits, the issue in this case is "when" not "whether" the CZMA applies to an OCS project. (CSO Br. 5).[3] Plainly, Congress was concerned that those stages of OCS projects having actual effects on state coastal zones be subjected to CZMA consistency review, and it accordingly delineated in Section 307(c)(3)(B) the way in which state programs apply to OCS exploration and development/production, when such impacts normally first arise. This action does not support the application of Section 307(c)(1) to the earlier OCS leasing stage when, as here, it gives rise to no such impacts.[4]

Instead of finding a clear statement in the statute to support them, respondents ask the Court to infer, from

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[3] CSO's admission refutes California's charge that Interior's construction of Section 307(c)(1) permits OCS projects "completely [to] escape compliance with the CZMA . . ." (Cal. Br. 23), as well as NRDC's argument that WOGA believes the OCSLA "completely subsumed" the CZMA (NRDC Br. 10).

[4] Similarly, those provisions of the CZMA requiring States to make adequate provision for the national interest associated with coastal zone related energy facilities pertain to state authority under Section 307(c)(3)(B) to regulate the exploration and development/production

(Footnote continued)

what they assert are the purposes of the CZMA, Congress' intention to apply Section 307(c)(1) to OCS leasing. Thus, California states that "effectuating the purpose of [the CZMA] is critical to [its] interpretation" (Cal. Br. 8), while NRDC describes as the first of the "best sources of the interpretation of [Section 307(c)(1)]" not its language, but rather "the purposes and policies behind the [CZMA]" (NRDC Br. 2; *see also* CSO Br. 7). While these policy arguments are themselves misconceived, *see* pp. 12-17, *infra*, the important point here is that reliance upon such a policy-based approach to the statute, in and of itself, concedes that the CZMA on its face contains no clear statement to support respondents.

Finally, respondents have identified no clear statement in the contemporaneous legislative history of Section 307(c)(1) to support them.[5] Instead, they rely upon a passage from a 1971 Senate Report, which stated that waters under federal jurisdiction having a "functional interrelationship" with waters in the coastal zone should be administered consistently with state CZMA programs. (*See, e.g.*, Cal. Br. 12). However, since the version of Section 307(c)(1) that was then before the Senate Committee was specifically limited to federal activities

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stages of an OCS project. (*See, e.g.*, CSO Br. 9; Local Gov. Br. 9). That these provisions of the Act do not support respondents' construction of Section 307(c)(1) is revealed by the fact that they were not made a part of the CZMA in 1972 when that section was enacted, but instead were added to the statute in 1976 when Congress modified Section 307(c)(3) to specify the application of the statute to the later stages of OCS projects. *See, e.g.*, Section 305(c)(8), 16 U.S.C. 1454(c)(8), which was added to the CZMA by Pub. L. No. 94-370, July 26, 1976.

[5] CSO admits that the "legislative history does not explain why Congress" substituted "directly affecting" for "in" the coastal zone. (CSO Br. 6-7).

"in the coastal zone," it is obvious that the Committee could not have contemplated that Section 307(c)(1) would extend to OCS activities on federal waters.

D. The 1976 CZMA Amendments and the 1978 OCSLA Amendments Do Not Reflect Congress' Intention To Subject the Selection of OCS Tracts for Leasing to State CZMA Programs.

Respondents argue that Congress' determination in 1976 not to amend Section 307(c)(3) to include the term "lease" is consistent with the belief that Section 307(c)(1) already applied to the selection of OCS tracts for leasing. (NRDC Br. 32; CSO Br. 27). Respondents, however, fail to cite the remarks of a single member of Congress to support this hypothesis. To the contrary, the Senate Committee, which first proposed to add the term "lease" to Section 307(c)(3), stated that this amendment would require the Secretary of the Interior to consult with governors before issuing leases. (WOGA Br. 40-41).[8]

Instead of rejecting the proposed amendment to Section 307(c)(3) as being redundant in the manner now suggested by respondents, the requirement of consistency review at the leasing stage of an OCS project was debated and rejected on the merits. (WOGA Br. 41-42). Had Congress believed that the selection of OCS tracts for leasing was already subject to Section 307(c)(1) consistency review, surely at least one member would have

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[8] California quotes the 1975 Senate report for the proposition that "full implementation" of the CZMA would include applying the consistency provisions of the Act to "the decision to lease large tracts of the OCS. . ." (Cal. Br. 27). However, the proposal to add the term "lease" to Section 307(c)(3) to achieve this result was ultimately rejected. The same observation vitiates NRDC's reliance upon the 1976 House Report. (NRDC Br. 31-32).

mentioned this fact during consideration of the 1976 CZMA amendments.

Similarly, nothing in the 1978 amendments to the OCSLA evidences Congress' intention to permit States to apply their CZMA programs to the selection of OCS tracts for leasing. To the contrary, as we have previously argued (WOGA Br. 24-27), Congress prescribed in Section 19 of that Act, 43 U.S.C. § 1345, quite different arrangements for state input into this decision.

Respondents make much of a footnote in a 1977 House Report, which recognized that "lease sales . . . must comply with 'consistency requirements' " under the CZMA. (*See, e.g.*, NRDC Br. 39).[7] However, as we previously explained (WOGA Br. 26 n. 19), this fragment from the massive legislative history underlying the 1978 amendments can be explained as a recognition that, on occasion, certain limited aspects of the leasing stage of an OCS project may give rise to direct coastal zone impacts which create consistency issues under Section 307(c)(1). Permitting States to require CZMA consistency for those unusual cases involving such leasing-stage impacts does not constitute the basis for permitting them to use their programs routinely to challenge the Secretary's selection

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[7] NRDC also relies upon committee prints to support its argument that Section 307(c)(1) applies to OCS leasing. (NRDC Br. 38). These prints do not even purport to communicate the intention of members of Congress. Moreover, they represent such a misunderstanding of the application of the CZMA to the OCS process that they are entitled to no consideration whatsoever. For example, the 1976 committee print of the House *Ad Hoc* Committee on the OCS, 94th Cong., 2d Sess., Effects of Offshore Oil and Natural Gas Development on the Coastal Zone erroneously reports that "the Secretary of the Interior can withhold approval of a State's Coastal Zone Management Plan if the plan interferes with the 'national interest' of the nation." (*Id.* at 228-29).

of OCS tracts for leasing.[8] Exercise of the former authority is consistent with Section 19 of the OCSLA, since it merely gives States a voice in the design of some limited aspects of an OCS project; the latter authority, on the other hand, puts them in a position to supercede Section 19 and challenge the Secretary's basic proprietary decision to engage in leasing itself.[9]

Moreover, it is clear that state representatives who testified during the consideration of the 1978 amendments to the OCSLA did not then view the CZMA as granting States authority with respect to the selection of OCS tracts for leasing. Thus, a California witness testified that the State would not have "any voice in major petroleum production off [its] coast with all of their attendant offshore problems until major changes are made in

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[8] WOGA's and the federal defendants' recognition that Section 307(c)(1) does apply at the leasing stage to deal with any direct effects on the coastal zone which might occur then answers respondents' arguments that we are seeking an implied exemption from the CZMA for OCS projects. (Cal. Br. 24-25). In this case, no leasing-stage impacts were identified by the lower courts.

[9] The substantial difference between applying Section 307(c)(1) to deal with occasional leasing-stage impacts and routinely applying it to challenge the Secretary's selection of OCS tracts refutes CSO's argument that our "concession" as to the application of Section 307(c)(1) at the leasing stage contradicts our reliance upon the 1953 Compromise of federal-state proprietary interests in the OCS. (CSO Br. 27 n.18). Moreover, this distinction answers the argument (NRDC Br. 32; CSO Br. 29) that we inconsistently rely on the 1976 CZMA legislative history not to extend the Act generally to "leases," while conceding that it can apply to leasing-stage impacts. CZMA review of "leases" would have allowed review of the Secretary's selection of OCS tracts; such review of isolated leasing-stage impacts rarely, if ever, would lead to review of tract selection.

Federal law."[10] On this basis, California urged the adoption of Section 19 of the OCSLA to fill a gap which it perceived in existing federal law:

> "It is for situations like these—where there is a clearly identifiable state interest—that we see the need for a process which would allow the governor to negatively nominate tracts and have that decision accepted by the Interior Secretary unless he makes specific national interest findings to justify a contrary conclusion."[11]

California's recognition that existing law—*i.e.*, the CZMA—did not provide the States with adequate input into the decisional process for the selection of OCS tracts was echoed by Alaska and Massachusetts, two of the other States that now seek as *amici* to convince the Court that Section 307(c)(1) of the CZMA, enacted in 1972, gives them greater authority than Section 19 of the OCSLA.[12]

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[10] Hearings on S.9 Before the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st Sess. 575 (1977) (Statement of Bill Press, Director, California Governor's Office of Planning and Research).

[11] *Id.* at 584. In criticizing the adequacy of existing federal law, California, of course, was fully aware of the application of the CZMA to OCS development activities. For on the very same page of the testimony urging passage of Section 19, California's witness recognized the application of the CZMA to the later stages of an OCS project. *Id.*

[12] *See id.* at 514 (Statement of Robert LaResche, Alaska's Commissioner of Natural Resources); Hearings on H.R. 1614 Before the House *Ad Hoc* Select Comm. on the OCS, 95th Cong., 1st Sess. 671-72 (1977) (Statement of Evelyn F. Murphy, Massachusetts' Secretary of Environmental Affairs).

II. RESPONDENTS' RELIANCE UPON COMMENTARY BY CONGRESSIONAL COMMITTEES IN 1980 WITH RESPECT TO THE CZMA DOES NOT SUPPORT THE DECISION BELOW.

In our opening brief, we discussed the skepticism with which a court should proceed in reviewing post-hoc legislative materials. (*See also* CSO Br. 13 n.7 ("recogniz-[ing] the hazards of relying on subsequent legislative history")). The very cases upon which respondents rely in urging this Court to give decisive weight to the 1980 committee commentary on Section 307(c)(1) undermine their position.

In *Andrus* v. *Shell Oil Co.*, 446 U.S. 657 (1980), this Court construed a 1920 statute by, *inter alia*, examining 1931 Senate hearings:

> "The 1931 Senate hearings were called specifically to review the *Freeman* [v. *Summers*, 52 L.D. 201 (1927)] case for fear that another 'Teapot Dome' scandal was brewing. Rarely has an administrative law decision received such exhaustive congressional scrutiny. And following that scrutiny, no action was taken to disburb the settled administrative practice; rather Senator Nye advised the Interior Department to continue patenting oil shale claims." *Id.* at 673 n.12.

Here, far from endorsing prior administrative construction of the CZMA, the 1980 House Report stated that it was "disappointed" there had been no administrative resolution of the Section 307(c)(1) "directly affecting" issue as it applies to OCS leasing. H. Rep. No. 1012, 96th Cong., 2d Sess. 34 (1980). It went on to note that

> "In light of the initiative to issue regulations defining the term 'directly affecting,' the committee be-

lieves it is premature to amend section 307 to redress the problem which has emerged." *Id.*[13]

Finally, the 1980 committee reports, which NRDC concedes are "hardly . . . model[s] of clarity" (NRDC Br. 34 n.36), do not unequivocally state that Section 307(c)(1) should be applied to OCS tract selection. The House Committee merely stated that the section should

> "apply whenever a Federal activity ha[s] a functional interrelationship from an economic, geographic, or social standpoint with a State coastal program's land or water use policies. . . . Thus, when a Federal agency initiates a series of events of coastal management consequences, the intergovernmental coordination of the Federal consistency requirements should apply." H. Rep. No. 1012 at 34.

The first justification offered by the House Committee for this approach was that, *inter alia*,

> "it allows Federal agencies to avoid the irretreivable commitment of resources for Federal activities likely to lead to results inconsistent with the requirements of approved state programs." *Id.*

However, courts adjudicating leasing stage OCS cases have consistently held that, in the light of Interior's authority to regulate the later stages of an OCS project, the

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[13] The other cases relied upon by respondents are inapposite. In *Seatrain Shipbuilding Corp.* v. *Shell Oil Company*, 444 U.S. 572 (1980), the court justified its reliance on post-enactment legislative history by reasoning that Congress had rejected a proposed amendment on the very ground that it was unnecessary in the light of prior administrative interpretation. In *Bell* v. *New Jersey*, ___ U.S. ___, 103 S. Ct. 2187, 2192-94 (1983), the court relied on 1978 amendments to assess the scope of a 1970 statute because the amendments were necessarily premised upon the adoption of a particular interpretation of the 1970 Act.

lease sale itself is not an "irretrievable" or "irreversible" commitment of resources.[14]

The 1980 Senate Report stated only that

> "the Department of the Interior's activities which preceded lease sales were to remain subject to the requirements of Section 307(c)(1). As a result, intergovernmental coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, as the Department of the Interior sets in motion a series of events which have consequences in the coastal zone." S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980).

Neither the federal nor WOGA petitioners dispute that Section 307(c)(1) applies to the so-called pre-leasing activities of the Department of the Interior; it does require consistency determinations for those aspects, if any, of the OCS leasing stage which "directly" affect the coastal zone. (*See* pp. 7-8, *supra;* WOGA Br. 26 n.19). But the selection of OCS tracts for leasing does not "directly" affect the coastal zone simply because later exploration and development/production activities might do so.

III. RESPONDENTS' POLICY ARGUMENTS DO NOT SUPPORT THEM.

A. The OCSLA Provides Sufficient Environmental Protection and Coastal State Co-Operative Mechanisms.

Respondents contend that a "liberal" construction of the CZMA is necessary to permit rational coastal planning and protection. This argument is ultimately pre-

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[14] *County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368, 1390 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); *Conservation Law Foundation* v. *Andrus*, 623 F.2d 712, 714-15 (1st Cir. 1979); *North Slope Borough* v. *Andrus*, 642 F.2d 589, 607-09 (D.C. Cir. 1980).

mised on the assertion that the CZMA and the OCSLA serve "vastly different" national purposes—the CZMA protecting the environment and the OCSLA "focus[ing] upon the development of the mineral resources of the OCS." (NRDC Br. 10; *see also* Local Gov. Br. 21-22, 41). On this basis, they contend that, if OCS leasing is not constrained by the CZMA, it will proceed without adequate environmental safeguards or coastal state planning mechanisms.

However, as even California recognizes, the OCSLA does not focus solely upon expeditious resource development, but "also makes clear Congressional intent to protect the environment." (Cal. Br. 41 n.70; *see also* CSO Br. 24). Thus, the Act's purposes repeatedly refer to protection of the environment,[15] and it is embedded with provisions requiring the most careful attention to environmental concerns.[16]

Indeed, the very policy which respondents claim can be furthered only by their construction of the CZMA—the participation of State and local governments in the planning stages of an OCS project—is specifically recited in the OCSLA and specifically implemented for every stage of an OCS project, including leasing. (*See* WOGA Br. 22-23).[17]

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[15] *See, e.g.*, 43 U.S.C. §§ 1802(2), (3), (7).

[16] *See, e.g.*, 43 U.S.C. §§ 1334(a)(2)(A), 1344(a)(2) & (3), 1346, & 1351(h)(1)(D).

[17] Respondents seek to distinguish the scope of Section 19 of the OCSLA from that of Section 307(c)(1) of the CZMA by arguing that the former permits "*any* coastal states that would be affected" by leasing to make recommendations and that the latter provides authority only to States that have approved CZMA programs. (NRDC Br. 12; *see also* CSO Br. 24-25 & n.17). However, respondents' and the lower courts' conception of the "direct" effects of leasing is so broad that virtually any coastal state that would have Section 19

(Footnote continued)

B. The CZMA Does Not Contemplate Premature Review Of Impacts.

Respondents' contend that denying them the opportunity to apply CZMA programs at the leasing stage results in a "piecemeal" approach and prevents them from reviewing an OCS project "as a whole." (Local Gov. Br. 28-29; NRDC Br. 45-46). But this argument begs the question that is before the Court—whether Congress intended for States to have general authority under Section 307(c)(1) to review OCS projects as a whole or whether, instead, it intended that state CZMA programs be applied to assess specific coastal zone effects at the time they are anticipated.[14]

A construction of Section 307(c)(1) as applying only to leasing-stage impacts, rather than allowing a broad overview of all impacts which might occur at later stages, is

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authority could also invoke its CZMA program at the leasing stage. Moreover, 28 states or territories, including virtually every one affected by OCS activities, have approved CZMA programs. (CSO Br. 3).

[14] The Local Governments unwittingly undermine their own position by relying upon the opinion of the Department of Justice concerning application of Section 307(c)(1) to OCS preleasing activities. As the Department stated:

> "It is well possible that some of the preleasing activities of the Secretary of the Interior will give rise to consistency problems which cannot be reviewed at all under the paragraph B procedure [307(c)(3)(B)], or for which such review comes too late." (Local Gov. Br. 30).

We have conceded the application of Section 307(c)(1) to leasing-stage impacts, if any, associated with an OCS project. The issue in this case is whether that section also permits leasing-stage review of exploration and production development stage impacts that are later reviewable under Section 307(c)(3)(B).

Certainly, the insistence that Section 307(c)(1) review be utilized to prescribe stipulations for leases (*id.* at 33-34; CSO Br. 17) cannot

(Footnote continued)

strongly supported by Section 307(c)(3)(B) of the CZMA. That section provides that

> "any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the [OCSLA] . . . shall, with respect to any exploration, development, or production described in such plan and affecting any land use or water use in the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with such state's approved management program. . . ."

Thus, States clearly are not permitted at exploration to speculate about the later impacts upon the coastal zone that may arise at the development/production stage. Whether this is called "piecemeal" review or is characterized as preventing States from prematurely applying their CZMA programs to deal with coastal zone impacts that are only hypothetical and speculative at early stages of an OCS project, it was clearly the intention of Congress that CZMA review relate to specific impacts at the stage when they might arise, not a project in general and all its potential effects.[19]

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justify invocation of CZMA programs to challenge the selection of OCS tracts for leasing. Moreover, respondents offer no examples of the type of issue that must be addressed through lease stipulation, as opposed to later conditioning of exploration or development/production permits following Section 307(c)(3)(B) CZMA review.

[19] Respondents' assertion of the need to have a broad overview of OCS projects through the CZMA prior to exploration and development/production ignores the fact that they have the right to exercise this type of broad scrutiny under Section 19 of the OCSLA, prior to the Secretary's selection of OCS tracts for leasing.

C. The Pyramidic Structure of OCS Leasing Obviates the Need for Leasing Stage Consistency Review.

Respondents claim that the definition of the term "lease" within the OCSLA guarantees OCS lessees the right to proceed with later stages of the project, so that CZMA review at the later stages is "too late" to be effective. (Cal. Br. 36-37). This argument ignores Section 8(b)(4) of the OCSLA, 43 U.S.C. § 1337(b)(4), which states that a lessee's rights are "conditioned upon . . . the approval of the development and production plan required by this Act," as well as Section 11(c), 43 U.S.C. § 1340(c), which requires Secretarial approval prior to exploration.

The degree to which respondents distort the OCS statutory scheme is perhaps best revealed by their contention that "due to the pyramidic structure of OCS leasing, basic decisions by DOI at the lease sale stage, such as choice of lease stipulations and tract selection, cannot easily be undone at later stages."[2] (NRDC Br. 49). However, as the D.C. Circuit recently reiterated:

> "the [OCS] . . . process is 'pyramidic in structure, proceeding from broad-based planning to an increasingly narrower focus as actual development grows more imminent.' Additional study and consideration

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[2] A related misconception is that the Department of the Interior determines or influences, at the leasing stage, whether oil will be pipelined or shipped by tanker, the flow of vessel traffic, the siting of onshore construction, and other related matters. (Cal. Br. 36-37). The pyramidic structure of OCS decision-making, however, postpones determination of those matters until later stages. As the court held in *County of Suffolk* v. *Secretary of the Interior*, 562 F.2d at 1379, the specification of pipeline routes, destination refineries, and other similar matters requires "endless hypothesis as to remote possibilities" which not even NEPA requires at the leasing stage of an OCS project.

is required before each succeeding step is taken." *California* v. *Watt*, 712 F.2d 584, 588 (D.C. Cir. (1983), *petition for rehearing pending.*[21]

The very point of such a pyramidic structure, as stressed by the framers of the OCSLA, is to provide a mechanism for continuous "review and evaluation of, and decision on" an OCS project after leasing has occured and thus to avoid "extensive litigation prior to lease sales, when onshore and environmental impacts of production activity are not yet known." WOGA Br. 30, citing H. Rep. No. 950, 95th Cong., 1st Sess. 164 (1977). Respondents' insistence that their CZMA programs be applied at the leasing stage of an OCS project to govern tract selection on the basis of speculation about coastal zone impacts that cannot occur until much later is flatly inconsistent with the policies adopted by Congress in enacting the OCSLA.

IV. RESPONDENTS' AMBIGUITY CONCERNING THE IMPLICATIONS OF THEIR CONSTRUCTION OF SECTION 307(c)(1) CONDEMNS THEIR POSITION.

Although California's complaint boldly proclaimed that it has the last word in determining consistency issues (WOGA Resp. Br. 5-6), California now states that it would have no CZMA veto authority and that, if there is disagreement as to a consistency issue, the federal agency can proceed. (Cal. Br. 44-45). California, however, carefully hedges this position by preserving its right to sue (*id.* at 44 n.75) and asserting that courts should pay "substantial deference" to a State's construction of its CZMA program. (*Id.* at 43 n.73).

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[21] *See also North Slope Borough* v. *Andrus*, 642 F.2d 589, 593-94 (D.C. Cir. 1980); *California* v. *Watt*, 668 F.2d 1290, 1297 (D.C. Cir. 1981).

The Local Governments have a more expansive view of state authority. They claim that the States and indeed the localities themselves "make the basic decisions" with respect to balancing competing demands on the coastal zone caused by OCS projects. (Local Gov. Br. 10). They assert that federal agencies should give "substantial deference" to their interpretation of CZMA programs and obviously would invoke federal litigation to ensure this deference.

The CSO approaches the matter from still a different perspective. It argues that the balancing of energy and environmental issues raised by OCS leasing has already been accomplished by virtue of the Department of Commerce's approval of State CZMA programs. (CSO Br. 25-26). CSO apparently assumes that courts could examine a State CZMA program *de novo* to discern that balance.

Thus, rather than presenting a consistent or coherent view as to how CZMA programs would actually be applied at the leasing stage of OCS projects, respondents and *amici* simply rely on litigation in the federal courts to resolve the issue. At no point, however, do they suggest how a court is to choose between conflicting federal and state views of the general requirements of a CZMA program, nor do they identify any provisions of the CZMA or OCSLA that a court could consult in undertaking this task.[2] Moreover, respondents seek to perpetuate the uncertainty and confusion that would be created by the adoption of their construction of Section 307(c)(1) by attacking in their cross-petition the Ninth Circuit's efforts to introduce some measure of clarification via its

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[2] While respondents assert that the "spectre of hypothetical state abuse of § 307(c)(1) consistency requirements is completely unfounded" (Cal. Br. 45-46), they do not deny that following the lower courts' decisions in this case, Massachusetts, New York, New Jersey, Mary-

(Footnote continued)

construction of the "maximum extent practicable" provision of the statute.

Ultimately, therefore, respondents' view of Section 307(c)(1) is that Congress gave States some undefined measure of authority over the disposition of federal OCS lands, without providing any guidance to the courts as to how CZMA consistency issues are to be resolved and without providing any alternative means for resolving such disputes. As we have submitted, it is simply inconceivable that Congress intended to plunge the proprietary aspects of OCS leasing into such a "morass." (WOGA Br. 45; WOGA Resp. Br. 37-38).

States can have their CZMA programs considered at the leasing stage of an OCS project without creating the confusion implicit in respondents' view of the CZMA. As we have previously pointed out (WOGA Br. 26-27), under Section 19 of the OCSLA the Secretary of the Interior is obliged to consider any provisions of state CZMA programs brought to his attention by a governor's recommendations and, indeed, he is directed to accept those recommendations if they result in an appropriate balance between national and state interests. Moreover, Congress has specifically provided a judicial remedy should the Secretary inadequately consider a governor's recommendations in the Section 19 OCSLA process.[21]

By declaring that the selection of OCS tracts for leasing does not "directly affect" a State's coastal zone under

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land, Virginia, North Carolina, California, and several Alaska local governments have instituted Section 307(c)(1) actions to complain of various aspects of OCS lease sales. (*See* WOGA Br. 20 n.14; WOGA Petn. 9 n.10).

[21] The "arbitrary or capricious" standard of review specified by Section 19(d), 43 U.S.C. § 1345(d), plainly requires the Secretary to

(Footnote continued)

Section 307(c)(1), but that CZMA programs must be considered in the Section 19 process when invoked by governors, this Court would harmonize the CZMA and OCSLA, serve what respondents assert is the CZMA policy interest of ensuring early consideration of state programs, and channel disputes into a congressionally prescribed judicial review mechanism.

CONCLUSION

The Ninth Circuit's decision that the selection of OCS tracts for leasing is a federal activity "directly affecting" a state's coastal zone should be reversed.

Respectfully submitted,

HOWARD J. PRIVETT
DONNA R. BLACK
MCCUTCHEN, BLACK,
VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017

E. EDWARD BRUCE
BOBBY R. BURCHFIELD
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, DC 20044

Attorneys for Petitioners

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consider all relevant matters brought to his attention by the State in the Section 19 process. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 414 (1971).

Alaska notes that Interior's promulgation, under protest pending this litigation, of consistency determinations led to the imposition of stipulations for several OCS lease sales off Alaska which persuaded the State not to pursue leasing-stage litigation. (Alaska Br. 9-11). Alaska fails to note, however, that Interior considered Alaska's views as to these stipulations under both Section 19 of the OCSLA and the CZMA.